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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PABLO CASTILLO, Plaintiff and Respondent, v. KHANG KIM NGUYEN, Defendant and Appellant.	G041494 (Super. Ct. No. 07CC04824) O P I N I O N

Appeal from an order of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

P.K. Schrieffer, Paul K. Schrieffer and Tami Kay Lee for Defendant and Appellant.

Law Offices of Timothy J. Donahue and Timothy J. Donahue for Plaintiff and Respondent.

* * *

Defendant Khang Kim Nguyen appeals from the court's denial of his motion to set aside a default and default judgment.[1] We affirm.

FACTS

On April 11, 2007, plaintiff Pablo Castillo filed a motor vehicle property damage and personal injury complaint against defendant. On July 18, 2007, service of the summons and complaint was made by substituted service, under Code of Civil Procedure section 415.20, subdivision (b),[2] at defendant's address, 13851 Yoak Street, Garden Grove, by delivery to a co-occupant named Kevin Nguyen, and by mailing the documents to the same address the following day.

Plaintiff requested entry of default on September 10, 2007, and mailed the request to defendant at the same Yoak Street address. Defendant's default was entered as requested on September 10, 2007. After plaintiff's first application for entry of default judgment was rejected for failure to file a statement of damages, plaintiff submitted his second application on January 11, 2008, and mailed a copy of the application to defendant at his Yoak Street address. On February 11, 2008, the court entered judgment for plaintiff against defendant.[3]

On September 11, 2008, defendant moved to set aside the default and default judgment under section 473.5 on the ground he did not receive "actual notice of

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[1] The court's denial of defendant's motion to vacate the default judgment is appealable as a postjudgment order under Code of Civil Procedure section 904.1, subdivision (a)(2). (*Generale Bank Nederland v. Eyes of the Beholder Ltd.* (1998) 61 Cal.App.4th 1384, 1394.)

[2] All statutory references are to the Code of Civil Procedure.

[3] Defendant asserts "there is no evidence whether there ever was a Notice of Entry of Default Judgment served on" him.

service of summons in time to defend such cause of action." He declared he had resided in one of the bedrooms at 13851 Yoak Street, Garden Grove for four years. "The remaining bedrooms are being rented to two other tenants. One tenant's name is Hung, and the other tenant's name is Tony. I do not know Hung and Tony's last names and I do not have any contacts with them on a regular basis. I am also not related to any of them. . . . Mail at my residence is collected by the landlord and is redistributed to the tenants. [¶] . . . I had never been contacted by anyone other than representatives from my insurance carrier . . . and my attorney regarding the December 7, 2006 motor vehicle accident. [¶] . . . I had never received any documents relating to this lawsuit from any individual other than my attorney, nor had I ever received any such document in the mail. [¶] . . . I do not know anyone named Kevin Nguyen. I am also unaware of anyone residing at 13851 Yoak Street, Garden Grove, CA by that name. [¶] . . . I have never been served with the summons and complaint pertaining to this lawsuit. . . . [¶] . . . I had no knowledge of the pending lawsuit until late August 2008 when Safeco Insurance Company of America advised me of the same."

A claims specialist at defendant's insurer, Safeco Insurance Company of America (Safeco), also filed a declaration (with exhibits) in support of defendant's motion to set aside the default and default judgment. The claims specialist declared that between April 4, 2007 and February 13, 2008, Safeco had phoned plaintiff's counsel eight times requesting information on plaintiff's insurance, the status of the claim, his treatment status and account balance, and/or the status of his injuries and treatment. Each time "Debbie" at plaintiff's counsel's office agreed to call back with the requested information. "Safeco did not receive a return call or response" to any of its phone calls. Safeco also sent letters to plaintiff's counsel on August 9, 2007, and November 9, 2007, stating Safeco was "eager to process this claim" and "requesting status of plaintiff's injuries and treatment, and possibly a demand package," but received no response from plaintiff's attorney. On June 13, 2008, plaintiff's counsel "returned a call to Safeco" and

"advised that he did not have an update on the status of plaintiff's injuries and treatment. He agreed to contact his client and call back with the requested information." "On August 15, 2008, Safeco received a letter from [plaintiff's counsel] demanding payment of the judgment."[4] Prior "to August 15, 2008, Safeco did not have notice and knowledge of the subject lawsuit."

The court announced its tentative ruling to deny defendant's motion: "Defendant . . . simply does not make a sufficient showing that he did not have actual notice of this action. There is no dispute that the address where the summons was served was and is [defendant's] address. He submitted a declaration that stated that he lives there with tenants he is not related to; that he does not know who 'Kevin Nguyen' is; that his mail is collected by the landlord and that he never received the documents in this case. He failed to state who was living at the residence at the time of service in July 2007, how the landlord distributes the mail, whether he has experienced mail delivery problems with his landlord before, or why he did not receive the two other documents that Plaintiff mailed to him. Although the situation with Plaintiff['s] counsel and Defendant['s] insurance company sounds suspicious, Plaintiff counsel's failure to inform Safeco of the litigation and the judgment is not a ground to set aside the default or default judgment."

Subsequently the court adopted its tentative ruling and denied defendant's motion to set aside the default and judgment.

DISCUSSION

Defendant argues that when "there is no showing that the party opposing the motion for relief from default judgment has suffered any prejudice or that injustice

[4] The letter was dated August 11, 2008, the day the six-month relief period under section 473 expired.

will result from the trial of the case on its merits, *very slight evidence* is required to justify a court in setting aside the default." He explains the focus of his appeal "is not whether [he] received actual notice of plaintiff's summons and complaint, but whether there are facts that would suggest [his] neglect was excusable."

Section 473.5 provides: "(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him . . . , he . . . may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. The notice of motion shall be served and filed within a reasonable time, but in no event exceeding the earlier of: (i) two years after entry of a default judgment against him . . . ; or (ii) 180 days after service on him . . . of a written notice that the default or default judgment has been entered. [¶] (b) A notice of motion to set aside a default or default judgment and for leave to defend the action . . . shall be accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his . . . avoidance of service or inexcusable neglect. . . . [¶] (c) Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that his . . . lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action."

We review the court's denial of defendant's motion under section 473.5 for an abuse of discretion. (*Olvera v. Olvera* (1991) 232 Cal.App.3d 32, 41.)

By its terms, section 473.5 only applies when "service of a summons has not resulted in actual notice to a party in time to defend the action." Here, the court found defendant failed to show he never received actual notice. Defendant argues the court failed to consider the evidence in his declaration, but, in reality, the court obviously found the declaration was not credible. Substantial evidence supports this finding. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) The evidence showed

the summons was served at, and mailed to, the address that defendant admitted was his residence. Moreover, the evidence showed that both the request for entry of default and the request for entry of default judgment were also mailed to the same address. Defendant never explained whether his normal receipt of mail had been unreliable; only that his landlord collected and distributed it. Although the trial court did not mention another potential inference, we cannot help but note that the name of the person on whom substituted service was made, "Kevin Nguyen," bears similarity to "Khang Nguyen." "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Id.* at pp. 478-479.)

The cases on which defendant relies are inapt as they involve section 473 motions brought within six months of the entry of judgment. (*Shamblin v. Brattain*, *supra*, 44 Cal.3d at p. 477; *Buckert v. Briggs* (1971) 15 Cal.App.3d 296, 301-302; *Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 690; *Hodge Sheet Metal Products v. Palm Springs Riviera Hotel* (1961) 189 Cal.App.2d 653, 655.)

Alternatively, defendant argues under *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981-982, the court should have vacated the default and default judgment on equitable grounds. But such relief is granted only "in exceptional circumstances," and the court's order is reviewed for abuse of discretion. (*Id.* at p. 981.) Moreover, *Rappleyea* set forth a "three-part" "stringent test to qualify for equitable relief from default," a test that requires the moving party, inter alia, to "'articulate a satisfactory excuse for not presenting a defense to the original action.'" (*Id.* at p. 982.) As discussed above, defendant's declaration did not articulate a satisfactory excuse for not presenting a defense. *Rappleyea* also requires the moving party to demonstrate "'it has a meritorious case.'" (*Ibid*.) Here, defendant submitted a general unverified denial as a proposed answer to the unverified complaint, but counsel did not offer an opinion regarding the

existence of a meritorious defense, nor was any other evidence offered on this issue. The court's ruling did not exceed the bounds of reason. Accordingly, the court did not abuse its discretion by denying defendant's motion.

Plaintiff requests appellate sanctions of $20,000 on the ground defendant's appeal is frivolous.[5] Plaintiff's brief contains no reasoned argument why this appeal is frivolous; therefore we treat his request as waived. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 523.) And counsel did not file a separate motion requesting sanctions as required by California Rules of Court, rule 8.276. In any case, it does not appear that defendant's appeal was "taken solely for delay." (§ 907.)

DISPOSITION

The order is affirmed. Plaintiff's motion for sanctions is denied. Plaintiff shall recover his costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.

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[5] Defendant contends plaintiff's respondent's brief was filed late and should not be considered. In fact, plaintiff filed his brief within 15 days from the date of this court's notice pursuant to California Rules of Court, rule 8.220.